



**Statement by
Mrs. Reshanty Bowoleksono
Counsellor of the Permanent Mission of the Republic of Indonesia
on Agenda Item 78**

**Report of the International Law Commission
on the work of its sixty-sixth session (Part / Cluster 2 and 3)**

New York, 5 November 2014

Mr. Chairman,

I would like to express once again the appreciation of my delegation for the opportunity to make additional comments on the issues that are currently being discussed under the Report of the Commission in its 66th session. Please allow me to begin by providing comments on certain topics of Part 2 then continue to Part 3 of the Report.

Obligation to Extradite or Prosecute (*aut dedere aut judicare*)

The Indonesian Delegation considers the work of codification and clarification of issues concerning the topic of “obligation to extradite or to prosecute” is of great importance to prevent impunity, given the fact that every criminal should be brought to justice and serve the punishment relevant to the crime. We welcome the final report of the commission which would provide valuable guidance for states on the topic.

We would like to express our appreciation Mr. Kriangsak Kittichaisaree, the Chairman of the Working Group and Mr. Zdzislaw Galicki, the former Special Rapporteur of the topic for their valuable contribution in the deliberation and consideration of the topic.

Protection of the Atmosphere

Mr. Chairman,

Allow me first of all to express my appreciation to Mr. Shinya Murase, the Special Rapporteur for the topic Protection of the Atmosphere for his excellent work as it is clear that it reflects extensive work on the topic including the 3 draft guidelines.

There is no denying that the topic is controversial, as shown by differing views of states, however the study on the topic by the Commission is important as it will help us not only in enhancing our understanding of the nature of the atmosphere as a limited natural resource beneficial to humankind, but more importantly, it will enable the international community to prevent the environmental degradation occurring in the atmosphere by preserving and conserving the natural resource.

It is important to emphasize that the atmosphere, a limited natural resource, is vital for life on earth and for the survival of humankind. Thus, the protection of the atmosphere, its natural and human environments, is of great importance. We support the suggestion that the modalities of the use or utilization of the atmosphere should be considered in depth. The degradation of the condition of the atmosphere has long been a matter of serious concern to the international community. In this regard, the concept of "common concern of humankind" would be applicable to the whole of the atmospheric problems proposed and deserves close consideration. However, as a consequence, the legal content of this concept is that a State can no longer claim that atmospheric problems are within the domestic jurisdiction. Indeed, this is consistent with the fact that the atmosphere consists of layers of gases surrounding the earth that moves and circulates the earth in a complicated manner. It would therefore be difficult to establish national jurisdiction over any segment of the atmosphere. This should not, however, prevent the Commission to prepare draft guidelines on the obligations of States to prevent and protect the atmosphere from human activities conducted by States and by natural and juridical persons that have the effect of introducing deleterious substances or energy into the atmosphere.

In light of the unique characteristics of the atmosphere, efforts to protect the atmosphere should also be pursued through international cooperation. It is therefore necessary that the modalities and mechanism for international cooperation should be elaborated in the draft guidelines, thus should be given priority.

I would now like to make a few comments on the proposed Draft Guidelines. Draft Guideline 1 on Use of Terms. Our delegation considers that the formulation of the definition of "Atmosphere" may help facilitate the further work on the draft guidelines. However, we believe at present the wording has not fully reflected the unique physical characteristics of the atmosphere. The present definition excludes the important fact that the atmosphere moves and circulates around the earth in a complicated manner called atmospheric circulation. We believe that this natural characteristic should be added as a component of the definition of "atmosphere" in Draft Guideline 1.

With regard to Draft Guideline 2 on Scope of the Guidelines, we are able to support paragraph (a), as it has captured the essence of the scope of the draft guidelines to be developed under the topic, and in particular agree that paragraph (a) recognizes that the specific objects of the protection of the atmosphere are the human environment and the natural environment, two objects that have intrinsic relationship with each other. However, with regard to paragraph (b) my delegation has some editorial reservation regarding the words "as well as to their inter-relationship" as it is unclear and hope there would be more deliberation to overcome this.

As regards Draft Guideline 3 on Legal Status of the Atmosphere, in paragraph (a) we are doubtful that the concept of "common concern of humankind" will serve the purpose of clarifying such concept. As presently drafted, this paragraph means that our "common concern" is the protection of the atmosphere, instead of the degradation of the conditions of the atmosphere. Therefore it is important to redraft paragraph (a) so as to reflect the correct understanding of the concept of "common concern of humankind".

Immunity of State Officials from Foreign Criminal Jurisdiction

Mr. Chairman,

On the Topic of Immunity of State Officials from Foreign Criminal Jurisdiction, let me begin by expressing my delegation's appreciation to the Special Rapporteur, Madam Conception Escobar Hernandez, for her excellent work on the topic especially regarding the immunity *ratione materiae* and in particular the concept of a "State official". The extensive research on practice of national and international judicial institutions, treaty practice and other work of the Commission, as well as her analysis on the issues will be beneficial for in the discussions and elaborations to come.

I would like to make brief comments on the two draft articles provisionally adopted by the Commission in its last session. On Draft Article 2 (e), my Delegation supports the inclusion of a definition of "state official" for the purpose of the draft articles. Such a definition is essential for identifying the individual who is entitled to immunity from criminal jurisdiction, either immunity *ratione personae* or *ratione materiae*. Furthermore, it is important to note that this definition is applicable solely for the purpose of the draft articles, so as to not be confused with the general notion of "state official" or "official" in other international instruments and in domestic legal systems that might have different meanings.

Regarding Draft Article 5, my Delegation also supports this provision, the wordings of which could be seen as a *mutatis mutandis* application of the provision of Draft Article 3. The term "State Official" in the draft article should also be understood in accordance with the definition of the term as provided in Draft Article 2 (e). We agree to the commentary to draft article 5 that contrary to draft Article 3 that specify the individuals that are entitled to immunity *ratione personae*, Draft Article 5 does not identify the individuals that are entitled to immunity *ratione materiae* as they have to be identified on a case by case basis, by applying the criteria set out in Article 2 (e) that highlight the existence of the link between the official and the state.

Identification of Customary International Law

Mr. Chairman,

As regards Formation and Evidence of Customary International Law, I wish to thank Mr. Michael Wood, the Special Rapporteur, for his intensive research and analysis on the topic, and the proposal of the 11 draft conclusion. Allow me now to make brief comments on some of the proposed draft conclusions.

Draft Conclusion 2 : Use of terms

We are of the view that a working definition of customary international law is necessary as it will provide a better understanding concerning the general context of the draft conclusions. We welcome the formulation of the definition that in essence reflects the language of Article 38, paragraph 1 (b) of the Statute of the International Court of Justice.

Concerning the definition of “international organization”, it would be best to postpone its consideration until the Commission will specifically deal with the use of terms in a comprehensive manner.

Draft Conclusion 3 : Basic approach : two constitutional elements

It is essential that in order to identify the existence of a rule of customary international law, there has to be the required two constitutional elements, namely the general practice, and the acceptance of the practice as law. This “two element” approach has been established in State practice and recognized by national courts, international courts and tribunal, UN Member states in the Sixth Committee, and by some authors. Draft Conclusion 3 has sufficiently reflected the “two elements” basic approach. Therefore, it is necessary in the future report to go deeper into the meaning of “general practice” and that of “accepted as law (*opinio juris*)” respectively.

Draft Conclusion 4 : Assessment of evidence

Draft Conclusion 4 provides that in assessing evidence for a general practice as law, regard must be had to the context, including the surrounding circumstances. The word “context” and also “surrounding area” are unclear and could give rise to different interpretation. In order to assist those who are responsible for assessing evidence for a general practice accepted as law such as judges, practitioners, government legal advisers, the words to be chosen should be easily understood.

Draft Conclusion 5 : Role of practice

My Delegation is supportive of the view that the conduct of states, as the primary objects of international law, contribute to the creation, or expression of rules of customary international law.

Draft Conclusion 6 : Attribution of conduct

Draft Conclusion 6 provides that State practice consists of conduct that is attributable to a State, whether in the exercise of executive, legislative, judicial, or any other function. However the inclusion of the term “or any other function” seems to unnecessarily broaden the scope of the Conclusion, thus creating the possibility of confusion or uncertainty.

Draft Conclusion 9 : Practice must be general and consistent

My delegation has reservations with regard to paragraph 4 on the need to pay due regard to the practice of States whose interests are specially affected in assessing practice. There should be further clarification on the need for paragraph 4 in the context of the principle of sovereign equality of States.

Draft Conclusion 10 : Role of acceptance of law

This Draft Conclusion is important as it constitutes a part of the “two elements” approach. However, my delegation has concerns regarding paragraph 1. The paragraph states “The requirement, as an element of customary international law, that the general practice be accepted as law means that the practice in question must be accompanied by a sense of legal obligation.” The

words “. . . the general practice in question must be accompanied by a sense of legal obligation” do not seem to sufficiently clarify the meaning of “accepted as law” or “*opinio juris*”.

The Protection of the Environment in Relation to Armed Conflicts

Turning to the topic of the Protection of the Environment in relation to armed Conflicts, I would like to express my appreciation to the Special Rapporteur, Ms. Marie Jacobsson for her excellent preliminary report. The research and analysis on various relevant aspects undertaken by the Special Rapporteur will certainly contribute to the discussion on the topic.

Our delegation welcomes the temporal approach and the general methodology adopted by the Special Rapporteur. The temporal approach to the topic is translated into three phases, namely Phase I (before an armed conflict), Phase II (during an armed conflict) and Phase III (after an armed conflict). In this regard, my delegation believes that Phase II should be the primary focus.

We noted there is recognition that there cannot be a strict dividing line between the different phases, and that as the work progresses, it will also become evident how the legal rules pertaining to the different temporal phases blend into each other. Therefore, there should be no attempt to accord different weight to the essence of each of the three phases. We understand that there are existing principles and rules dealing with armed conflicts including 2 (two) international legal instruments. Since then, however, there are different types of armed conflicts that have unfortunately taken place in different parts of the world that will really require further international efforts to protect the environment by adopting principles, rules or guidelines that specifically address the protection of the environment in armed conflicts international or non-international.

On the issue of protection of cultural heritage, even though there are legal instruments that have been adopted by UNESCO on this issue, the Indonesian Delegation firmly believes that the study should include protection of cultural heritage. In this regard, the Commission could examine among others whether there are gaps found in the existing legal instruments that the Commission could usefully address with the aim of filling those gaps.

In relation to the restriction of the scope of the topic, we are of the view that the Commission should address situations of non-international armed conflicts as equally as international armed conflicts.

We have noted that the Commission discussed extensively concerning environmental principles and concepts of sustainable development, prevention and precaution, polluter pays, environmental impact assessment and due diligence. We are supportive that those principles and concepts be further deliberated and discussed in order to find the proper applicability in the context of protection of the environment in relation to armed conflicts.

Provisional Application of Treaties

Mr. Chairman,

Moving on to the Provisional Application of Treaties, my delegation would like to express our appreciation to the Special Rapporteur, Mr. Manuel Gomes-Robledo for his report. Even though Indonesia is not a party, we take the view that the 1969 Vienna Convention on the Law of Treaties is certainly the basis on which the Commission should develop a mechanism or a set of guidelines that would provide States with guidance relating to the provisional application of treaties.

We are further of the view that it would be essential to consider the relationship between provisional application of treaties and the constitutional law requirements for the entry into force of the treaty concerned, as the provisional application of treaties could lead to a conflict between international law and constitutional law of the parties concerned. It is therefore imperative that, for reason of legal certainty, any guidelines on the provisional application of treaties must include establishing conditions for the provisional application of treaties that would avoid the potential of conflict.

The Indonesian Delegation would like to reiterate that the purpose of this topic is not to encourage States to use the mechanism of provisional application more often. Instead, the aim should rather be to provide a mechanism or guidelines for the provisional application of treaties that will serve as an option to States that might have the intention to provisionally apply a treaty pending its entry into force. However, it is ultimately the sovereign right of States to decide on what is best for them concerning the provisional application of treaties.

Mr. Chairman,

Before I conclude my statement, I wish to express the support of my delegation for the further work of the International Law Commission.

I thank you.

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